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THE FAILURE OF ANALOGY IN CONCEPTUALIZING PRIVATE ENTITY LIABILITY UNDER SECTION 1983

© Richard Frankel*

I. INTRODUCTION

The landmark civil rights statute, 42 U.S.C. § 1983, is a significant vehicle for individuals who suffer violations of constitutional or federal statutory rights at the hands of state actors to hold those government officials accountable for their misdeeds. Over its nearly 140-year history, courts have developed a rich body of doctrine that provides rules for determining the scope of government liability. This body of law includes rules for determining a number of issues, such as which government actors can be held liable under the statute, the degree to which they can be held liable, the types of remedies that they may be required to provide, and the scope of any immunities or other liability protections to which they might be entitled.

Section 1983 applies primarily to state and local governments and their employees because the statute, by its plain language, applies only to persons acting “under color” of state law.¹ Through the development of the “state action” doctrine, however, private parties that act jointly with the government or that perform traditional government functions are considered state actors that are required to comply with constitutional directives and are subject to § 1983.²

Although courts have applied § 1983 to private actors for at least forty years,³ they have struggled to develop rules for determining private-party liability, and in particular rules for private-entities—i.e. private businesses as opposed to the individuals working for those businesses.⁴ Yet, questions concerning the nature and scope of private-entity liability are becoming increasingly important as state and local governments privatize more and more government services. By privatization, I generally mean the “government use of private entities to implement government programs or to provide services to others on the government’s behalf.”⁵ The last twenty years have witnessed an

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¹ See 42 U.S.C. § 1983 (2006).

² A private party qualifies as a state actor when, among other things, it performs a function that was traditionally and exclusively governmental. See *Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002). State action also occurs when a private party is a “willful participant in joint activity with the State or its agents.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 296 (2001) (quotation marks and citation omitted).

³ In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Supreme Court found that a plaintiff could sue a department store under § 1983 if the plaintiff could show that the store’s employees engaged in a joint conspiracy with the State. *Id.* at 152.

⁴ See, e.g., Barbara Kritchevsky, *Civil Rights Liabilities of Private Entities*, 26 *CARDOZO L. REV.* 35, 36, 38 (2004) (noting that the Supreme Court has “engaged in little discussion of the rules that govern liability” of private entities and that lower courts have not been consistent in their application of § 1983 rules to private parties).

⁵ Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367, 1370 (2003).

expansive growth of privatization at all levels of government, including the state and local levels.⁶ State and local governments have contracted with private parties to perform a wide array of core government services,—often very sensitive services—including operating prisons,⁷ providing medical care to prisoners,⁸ administering welfare and public benefit programs,⁹ processing parking tickets,¹⁰ providing private security services,¹¹ collecting government debts,¹² fighting fires,¹³ and overseeing foster care and child placement

⁶ See Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1289 (2003) (observing “a discernable trend toward ‘privatization,’ which in the American context consists largely of contracting out”); Metzger, *supra* note 5, at 1379 (“Privatization seems likely only to expand in the near future, fueled by increasing belief in market-based solutions to public problems.”); Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight*, 52 VAND. L. REV. 489, 493 (1999).

⁷ As of June 30, 2007, 7.4 % of all U.S. prisoners were housed in private facilities. 30,379 federal prisoners and 87,860 state prisoners were in private facilities. William J. Sabol & Heather Couture, Bureau of Justice Statistics Bulletin, *Prison Inmates at Midyear 2007* 5 (Dept. of Just. June 2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf>. Additionally, private prisons hold alien detainees facing deportation or other immigration-related charges. See Margaret Talbot, *The Lost Children*, NEW YORKER, Mar. 3, 2008, at 58. By the mid-1980s, private facilities held nearly thirty-percent of detained aliens. See James Austin & Garry Coventry, Bureau of Justice Assistance, *Emerging Issues on Privatized Prisons* 12 (Dept. of Just. 2001), available at <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

⁸ Correctional Medical Services (“CMS”), one of the larger prison healthcare companies, alone provides health services to over 260,000 inmates. See Correctional Medical Services, *About Us*, http://www.cmsstl.com/about_us.aspx (last visited Mar. 29, 2010). Prison Health Services (“PHS”), provides health care for an additional 270,000 prisoners. See Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301, 302 (2007). CMS estimates that forty-two percent of all prison health services are provided by private companies. See Correctional Medical Services, *About Us*, *supra*.

⁹ As many as forty states have privatized aspects of their welfare and public benefits administration and delivery programs and have spent billions on contracts with private welfare providers. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1180 (2000); Metzger, *supra* note 5, at 1383-88; Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 87-88 (2003).

¹⁰ See, e.g., *Ace Beverage Co. v. Lockheed Information Mgmt. Servs.*, 144 F.3d 1218, 1219 (9th Cir. 1997) (finding that a private company that processed parking tickets for the city of Los Angeles acted under color of state law for purposes of § 1983).

¹¹ See, e.g., *Powell v. Shopco*, 678 F.2d 504, 505 (4th Cir. 1982) (finding that private security guard could be sued under §1983); *Groom v. Safeway*, 973 F. Supp 987, 991-92 (W.D. Wash. 1997) (holding that a grocery store acted under color of state law when it hired an off-duty police officer to work as a private security guard); see also *Flagg Bros. v. Brooks*, 436 U.S. 149, 163-64 (1978) (identifying police protection as a traditional public function).

¹² See, e.g., *Del Campo v. Kennedy*, 517 F.3d 1070, 1072-73 (9th Cir. 2008) (describing how a private company sought to collect debts owed to the state of California).

¹³ See Jesse McKinley, *On the Fire Lines, a Shift to Private Contractors*, N.Y. TIMES, Aug. 18, 2008, at A11; see also *Flagg Bros.*, 436 U.S. at 163-64 (identifying fire protection as a traditional public function).

programs.¹⁴ Moreover, many of these services, such as operating prisons or providing security—as opposed to building roads, say—are the types that create conditions in which constitutional violations by the private entities providing these services.¹⁵

As privatization increases, it is important for courts to develop a clear, well-reasoned framework for addressing questions of private-entity liability in order to ensure that citizens who receive public services from private providers do not face undue risks to their constitutional rights.¹⁶ Currently, one of the approaches that courts commonly take in determining private-entity liability is that of analogy. Courts often have determined the scope of private-entity liability by analogizing private entities to government actors. When courts determine that a private-entity resembles a government actor, the private-entity tends to be subject to the same liability rules, and to receive the same protections from liability, as the relevant government actor.¹⁷ When courts determine that the character or

¹⁴ See, e.g., *Donlan v. Ridge*, 58 F. Supp. 2d 604, 610-11 (E.D. Pa. 1999) (holding that a private foster care provider acted under color of state law); *Bartell v. Lohiser*, 12 F. Supp. 2d 640, 649-50 (E.D. Mich. 1998) (finding that a private contractor who provided foster care acted under color of state law and could receive qualified immunity).

¹⁵ Privatization also has been popular at the federal level. At the federal level, government contracting to private parties increased by fifty-percent from 2002 to 2005. See Kerry Korpi, Panel Discussion, *Outsourcing Government? The Privatization of Public Responsibilities* (American Constitution Society Annual Convention June 13, 2008), available at <http://www.acslaw.org/node/6787> (Kerry Korpi's comments appear in the audio recording available at this url). Some of this involves particularly sensitive functions as well, including intelligence gathering and national security. The State Department contracted out to private security firms like Blackwater USA to provide security in Iraq, which included the ability to use deadly force when necessary. See, e.g., John M. Broder & David Rohde, *State Dept. Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct 24, 2007, at A1; see also TIM SHORROCK, *SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING* (Simon & Schuster 2008) (describing privatization of intelligence services). However, while private parties performing state action can be sued under § 1983, there is no corresponding cause of action for constitutional violations against private parties who perform government functions for the federal government. See *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

¹⁶ Section 1983 provides a cause of action for violations of both constitutional rights and federal statutory rights. For ease of reference, because many § 1983 claims arise under the Constitution, this paper refers to § 1983 claims as involving constitutional rights.

¹⁷ For example, in *Monell v. N.Y. City Dep't of Social Servs.*, 436 U.S. 658, 690-94 (1978), the Supreme Court held that municipal § 1983 defendants were exempt from the traditional tort rule of respondeat superior liability. Lower courts have extended that same rule to private-entity defendants, on the ground that *Monell's* reasoning also applies to private entities. See, e.g., *Powell v. Shopco*, 678 F.2d 504, 506 (4th Cir. 1982) (concluding that “[n]o element of the [Monell] Court’s *ratio decidendi* lends support for distinguishing the case of a private corporation [from a municipality].”). Most lower courts have reached the same result. See, e.g., Kritchevsky, *supra* note 4, at 55 n.149 (listing cases). For critiques of exempting private § 1983 defendants from respondeat superior liability, see *Hutchison v. Brookshire Brothers, Ltd.*, 284 F. Supp. 2d 459, 473 (E.D. Tex. 2003); *Segler v. Clark County*, 142 F. Supp. 2d 1264, 1268-69 (D. Nev. 2001); *Taylor v. Plousis*, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000); Richard H. Frankel, *Regulating Privatized*

behavior of the private entity is distinguishable from that of the governmental comparator, then courts tend not to give the private entity the same protections from liability that the government entity receives.¹⁸

While analogy is an essential part of legal reasoning and often serves as a useful interpretive tool, this paper suggests that in the context of private-entity liability in § 1983 actions, judicial reliance on analogy leads to poor results that impair victims of constitutional violations from vindicating their rights. Instead of using analogy as a tool for understanding or applying the purposes and principles of § 1983, the analogy itself takes primacy and becomes the basis for the court's decision. The courts' reasoning centers on whether or not an analogy can be drawn, often at the expense of the underlying purpose that the analogy is supposed to further. This focus on analogy has two drawbacks. First, it can lead to misguided and counter-productive results that subvert § 1983's principles and that insufficiently protect constitutional rights. Second, where the analogies that courts draw are themselves flawed, they have created an unprincipled doctrine regarding private-entity § 1983 defendants.

Instead of attempting to determine whether private entities fit or do not fit into the different boxes of various governmental defendants, courts should treat private-entities as their own category. Private entities have certain characteristics that make them resemble individual government entities and certain characteristics that make them different from government entities.¹⁹ The same is true when it comes to comparing private entities with individual government employees.²⁰ Courts should look at private entities as exactly that, private entities, and should focus on the specific characteristics of private entities in deciding which liability rules to apply to them in order to best serve § 1983's purposes.

Removing analogy as the framework for determining private-entity liability, however, does not help determine what framework should take its place. This paper proposes that in addressing private-entity liability under § 1983, courts can utilize the huge body of law that already exists for determining the liability of private parties that commit injurious acts—private tort law. Although tort law principles often have been used to restrict the scope of § 1983,²¹ in the private-entity context, the application of constitutional principles specific to § 1983, as opposed to tort principles, have actually made it more difficult for individuals to

Government Through Section 1983, 76 U. CHI. L. REV. 1449 (2009); Kritchevsky, *supra* note 4, at 73-76.

¹⁸ See, e.g., *Del Campo v. Kennedy*, 517 F.3d 1070, 1072-73 (9th Cir. 2007) (concluding that private party sued under § 1983 was not entitled to Eleventh Amendment state sovereign immunity).

¹⁹ See *infra* notes 52-57 and accompanying text.

²⁰ Private corporations often receive certain benefits from the state that individuals do not get, in terms of limited liability and particular tax breaks. But corporations are also distinctly private entities with an identity separate from the state. Private entities also are unlike individuals in other ways. The main purpose of taking on corporate status is to separate the identities of the corporation's officers from the identity of the corporation itself.

²¹ See *infra* notes 144-46 and accompanying text.

vindicate constitutional rights and resorting to ordinary tort principles may more effectively further § 1983's purposes.

This paper proceeds in four parts. Part II describes the current approach to determining private-entity liability and explains how courts often rely on analogy as their interpretive method. Part III offers some hypotheses about why courts may tend to use analogy in the private-entity context. Part IV examines three recent Supreme Court decisions in § 1983 or *Bivens* cases²²—two involving private defendants and one involving governmental defendants—to show how the Court's reliance on analogy in each case led to an unsound or misguided result. Part V suggests that courts should stop making analogy the primary focus with respect to private-entity liability and proposes that courts instead look to private tort-law principles as a guide for assessing private-entity § 1983 liability.

II. THE CURRENT APPROACH TO PRIVATE-ENTITY LIABILITY UNDER § 1983

Section 1983 provides a cause of action to any individual whose constitutional or federal statutory rights are violated by persons acting “under color” of state law.²³ The Supreme Court has described the main purposes of the statute as deterring future constitutional violations and ensuring compensation for those who suffer constitutional injury.²⁴ Because of the “under color” of state law requirement, § 1983 actions typically involve government defendants—state governments, municipalities, or state or municipal employees in either their official²⁵ or individual capacities. Over the course of the statute's life, the courts have developed various principles and doctrines governing liability for different categories of government defendants. For example, different immunities and protections from liability apply depending on whether the defendant is a state government, a municipality, a government employee, or a supervisory employee; and then even within those categories, different employees have different protections depending on the particular government functions they perform.²⁶

While courts have developed a robust body of law for the liability of different government actors, they have had less opportunity to develop doctrines regarding the liability of private entities and individuals that act “under color” of

²² A *Bivens* action is the federal equivalent to § 1983. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court established an implied right of action against federal officers for the violation of certain constitutional rights. Unlike § 1983, only certain constitutional violations can be remedied through *Bivens* actions, and unlike § 1983, *Bivens* does not apply to private companies acting under color of federal law. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

²³ 42 U.S.C. § 1983 (2006).

²⁴ See *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (“Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well.”).

²⁵ Suits against state officials in their official capacities are equivalent to suing the state itself. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).

²⁶ See *infra* notes 37-43 and accompanying text.

state law and thus are subject to § 1983. In part this may be because courts have had fewer opportunities to deal with private § 1983 defendants. Although there is a long history of private actors performing governmental functions, only in the last couple decades has the privatization of state and local government functions really taken off. Perhaps for this reason, when courts have faced questions regarding private-entity liability, they have tended to take the more-developed law that exists for government defendants and to apply it by analogy to private defendants. In other words, where a liability issue arises with respect to a private-entity defendant, courts appear to respond by asking whether the private-entity is akin to or distinct from the government actor. If the former then the liability rule applying to the government actor will also apply to the private actor,²⁷ and if not, then the liability rule will not apply to the private-entity.²⁸

For example, in *Monell v. Department of Social Services*, the Supreme Court held that municipalities were “persons” that could be sued for damages under § 1983, but that they were exempt from the traditional agency rule of respondeat superior liability.²⁹ The Court held that a municipality could be liable for damages only if the plaintiff could show that the municipality directly caused the constitutional violation through the application of some municipal policy or custom.³⁰ When private companies have faced suit under § 1983, courts have almost universally concluded that private-entities are like municipalities and therefore also exempt from respondeat superior liability.³¹ Analogy appears to be the dominant framework by which courts assess the liability rules applicable to private § 1983 defendants.

The decision to use analogy as an interpretive tool, however, does not indicate the type of analogy that should be drawn. In the respondeat superior example, courts appear to have simply assumed that a municipality is the most comparable defendant to a private entity.³² But it is not at all clear that is the case. In any particular privatization situation, there may be any number of different government actors to which a private entity could be analogized. Take, for example, a private company that contracts with a municipality to perform certain core government functions, such as operating a municipal jail, or

²⁷ See, e.g., *Malesko*, 534 U.S. at 70-71 (concluding that no *Bivens* cause of action exists against a private entity because no cause of action exists against federal agencies and private corporations are like federal agencies). *Malesko* is discussed in greater detail in Part IV.B.

²⁸ See, e.g., *Richardson v. McKnight*, 521 U.S. 399 (1997) (concluding that private prison guards are not entitled to qualified immunity even though state prison guards are entitled to qualified immunity). *Richardson* is discussed in greater detail in Part IV.A.

²⁹ 436 U.S. 658, 691 (1978).

³⁰ See *Monell*, 436 U.S. at 694.

³¹ See *supra* note 17.

³² See, e.g., *Powell v. Shopco*, 678 F.2d 504, 506 (4th Cir. 1982) (deciding to extend *Monell* to private corporations because “[n]o element of the [*Monell*] Court’s *ratio decidendi* lends support for distinguishing the case of a private corporation [from a municipality].”).

administering welfare benefits or other social services.³³ One could analogize the private contractor to a municipality on the theory that it is standing in the shoes of or acting as the equivalent of the municipality. But one also could analogize the private contractor to a government employee on the theory that the private contractor has been hired by the municipality, just as it hires employees, to perform particular services. Alternatively, one could analogize the private contractor to a supervisory government employee as opposed to the employee committing the unconstitutional act, on the reasoning that while the private company is hired by the municipality to perform a function, that function ultimately is carried out by the company's employees, who are then supervised by company officials. While each of these analogies may have their own strength and weaknesses, it is not as self-evident as courts make it appear which analogy is the proper one, or if any analogy should be used at all.³⁴

Indeed, Professor Barbara Kritchevsky has shown that courts tend to analogize to different government actors in different situations. After examining a series of lower court decisions regarding private entities, she concludes that when addressing the scope of entity liability, courts generally "analogize private and government entities," but when it comes to questions of immunity, they tend to analogize private entities to individual government employees.³⁵ Professor Kritchevsky then goes on to demonstrate how the analogies that courts are drawing lead to poor decisions in particular contexts, specifically with respect to qualified immunity, punitive damages, sovereign immunity, and vicarious liability.³⁶

Although the question of which analogy to draw may seem like an academic one, it can have significant implications for a plaintiff's ability to obtain relief for the constitutional violations of private actors operating under color of state law because of the different liability rules that apply to different defendants. For example, while municipalities may be sued for damages under § 1983,³⁷ state entities are protected from damages by Eleventh Amendment immunity³⁸ (though state officials in their official capacity can still be sued for

³³ Such actions typically would qualify as state action. *See, e.g., West v. Atkins*, 487 U.S. 42 (1988) (holding that a private medical personnel were state actors when under contract to provide medical services to prison inmates).

³⁴ In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), discussed *infra* in Part IV.B., the debate between the majority and the dissent was about what type of analogy should be drawn. The majority drew an analogy between private corporations and federal agencies to conclude that there was no *Bivens* cause of action against a private company. *Id.* at 70-71. The dissent, by contrast, characterized the private company as an agent of the federal government and concluded that corporate agents, just like human agents, could be sued under *Bivens*. *Id.* at 78-83 (Stevens, J., dissenting).

³⁵ Kritchevsky, *supra* note 4, at 38-39.

³⁶ *Id.* at 50-70.

³⁷ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978).

³⁸ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989) (concluding that states have Eleventh Amendment immunity from damages under §1983).

injunctive relief³⁹). Individual defendants can be subject to punitive damages⁴⁰ while municipal defendants are immune from punitive damages.⁴¹ On the other hand, individual government defendants are entitled to qualified immunity⁴² while municipalities are not.⁴³

Like Professor Kritchevsky, this paper also questions the use of analogy for determining § 1983 liability. While Professor Kritchevsky focuses on specific liability issues facing private entities—such as qualified immunity, liability for punitive damages, and the exemption from respondeat superior liability⁴⁴—this paper looks at analogy as an interpretive framework and asks whether it is an effective one for addressing the liability of private § 1983 defendants. Kritchevsky suggests that the use of analogy by lower courts is flawed because it deviates from Supreme Court precedent indicating that courts should determine liability based on history and policy.⁴⁵ This paper, in the Sections that follow, suggests that the Supreme Court's own decisions, and its own use of analogy, highlight the failure of analogy in the § 1983 context and demonstrates why the framework of analogy as a whole, rather than its application in specific § 1983 contexts, should be reconsidered. This paper examines three specific Supreme Court decisions in § 1983 or *Bivens* cases in which analogy has played a role in the Court's reasoning. Based on those cases, this paper suggests that in the § 1983 context, the analogy framework itself is flawed, not necessarily because it leads to bad results, but because it causes the court to focus on the wrong questions. The use of analogy is problematic because the analogy takes center stage at the expense of the statute's underlying purposes. The Court tends to focus more on whether a private-entity is like or unlike a particular government actor than on whether applying a particular liability rule to a private entity would further the goals of § 1983. In so doing, the Court ends up making decisions that unduly narrow the scope of § 1983 and limit the ability of injured plaintiffs to vindicate rights protected by the Constitution.

III. REASONS THAT COURTS TEND TO USE ANALOGY

Analogy is just one of many interpretive frameworks that courts can use to resolve legal questions. Yet comparing private entities to government actors seems to be a common way of addressing private-entity liability in the § 1983 context. This Part offers some thoughts on why courts might tend to use analogy and why they have struggled with how to use analogies.

³⁹ See *Kentucky v. Graham*, 473 U.S. 159, 165-67, 167 n.14 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

⁴⁰ See *Smith v. Wade*, 461 U.S. 30 (1983).

⁴¹ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

⁴² See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001) (describing the contours of qualified immunity).

⁴³ *Owen v. City of Independence*, 445 U.S. 622 (1980).

⁴⁴ Kritchevsky, *supra* note 4, at 70-78 (critiquing the application of particular liability rules to private parties).

⁴⁵ *Id.* at 38-39.

One reason that courts may feel tempted to use liability rules relating to government actors as a benchmark for determining private entity liability is because of the state action doctrine. Private entities are subject to § 1983 only if they act “under color of state law.”⁴⁶ A private party acts under color of state law where the party’s conduct is “fairly attributable to the State.”⁴⁷ The Supreme Court has articulated various tests for defining state action, including whether a private party performs functions “traditionally exclusively reserved to the State,”⁴⁸ whether the private party is a “a willful participant in joint activity with the State or its agents,”⁴⁹ or whether “there is a sufficiently close nexus between the State” and the private party’s action such that the private party’s action “may be fairly treated as that of the State itself.”⁵⁰

In other words, a private party is subject to § 1983 only when it is behaving like a government actor or is standing in the shoes of the government in some way. Given the requirement that a private party act like a state, it is only natural to look to the liability rules regarding government actors in determining the liability of private entities acting under color of state law. Put another way, if private parties are only subject to § 1983 in the first place by virtue of engaging in state action, then it seems reasonable that they should be subject to the same liability rules as government actors, or at the very least that the liability rules for governments should provide a starting point and a framework for addressing private party liability.⁵¹

There is no reason, however, why the state action doctrine should determine the framework for determining private liability rules. Whether an entity is considered to be sufficiently similar to the State for determining whether it is subject to § 1983 at all does not automatically mean that the entity needs to be compared to a State in addressing the scope of liability, and in particular, the protections from liability that it may or may not be entitled to receive.

A second reason why courts might resort to analogy in determining private party liability is that it provides a cover to allow the court to impose its own policy preferences on the shape of § 1983 doctrine. Because private entities are not exactly like government entities and not exactly like government employees, there is a lot of wiggle room to allow judges to draw almost any type of analogy that they wish. Many scholars have criticized the Court’s § 1983 as indeterminate and as reflecting the Justices own individual policy preferences

⁴⁶ *West v. Atkins*, 487 U.S. 42, 48 (1988).

⁴⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

⁴⁸ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

⁴⁹ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

⁵⁰ *Jackson*, 419 U.S. at 351.

⁵¹ The state action doctrine has been heavily criticized on various grounds, *see, e.g.*, Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1172 n.10 (listing articles critiquing the state action doctrine), and in particular on the ground that it is poorly suited to deal with privatization in its modern form, *see generally id.* The fact that the state action doctrine might not effectively account for current forms of privatization also suggests that perhaps the state action requirement also should not be a reason to rely so heavily on analogy to determine private party liability under § 1983.

more than any coherent doctrinal viewpoint.⁵² Given the various types of government actors to which a private entity could be analogized—municipalities, states, supervisory employees, ordinary employees-- and given that each type of actor is subject to different liability rules, it may be that courts use analogy so that they can decide which government actor to analogize to based on the outcome that it wants to reach.

A third, related, reason may be based on litigation tactics and the way that lawyers frame the issue of private-entity liability and present it to the Court. Just as the range of possible analogies gives courts freedom to choose a comparator based on the result that it wants, litigants may frame private party liability questions in terms of analogy in order to try and achieve the results that their clients want. To the extent that private-entity liability issues remain unresolved, litigants have an interest in analogizing to, or distinguishing from, whichever government actor will either maximize liability (from the plaintiff's perspective) or minimize liability (from the defendant's perspective).

Finally, the tendency to analogize and the difficulty the courts have in settling on particular analogies may come from the fact that it is not easy to pinpoint whether and how corporations resemble persons, states, or other entities. Corporations have characteristics of state entities, of private entities, and of natural persons. Thus, it is easy for one person to think that corporations are like the government and another to say that it is unlike the government, which opens up opportunities for courts to draw different analogies in different circumstances.

In one sense, corporations may seem more like government entities than individuals do. Unlike natural persons, the private company's existence would not exist but for the sanction of the State, and in that sense, private companies are creatures of the state in ways that individuals are not.⁵³ Additionally, while corporations—at least publicly-traded corporations—exist to serve the private ends of their shareholders, historically, particularly in the 17th and 18th centuries, corporations were created by state charter so that they could trade and operate in pursuit of the State's mercantilist goals.⁵⁴ Now, by contrast, the level of state involvement in and public purpose of corporations is much more limited.

Just as corporations have characteristics that make them seem like government entities, they also have some characteristics that resemble individual persons. Corporations are typically treated as persons under state and federal

⁵² See, e.g., Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 53 (1988) (describing the "indeterminacy" of the Court's § 1983 doctrine); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 774, 794 (1987); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 54, 87-88 (1986).

⁵³ See, e.g., *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (distinguishing between corporate identity and individual identity in determining that corporations do not have Fifth Amendment protections against self-incrimination).

⁵⁴ See ALAN R. PALMITER, *CORPORATIONS*, 7-8 (6th ed. 2009); see also JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* 32 (2d ed. 2003) ("The dominant feature of businesses incorporated in the eighteenth century was their public character.").

law, and state and federal statutes “typically give a corporation ‘the same powers as an individual to do all things necessary or convenient to carry out its business and affairs.’”⁵⁵ On the other hand, one of the main purposes of corporate status—the protection of limited liability—is predicated on the notion that corporate identity is distinct from the identities of the people running it.⁵⁶ Perhaps because of these dueling properties of the corporate form, courts have struggled in areas of constitutional law in particular to decide whether corporations should be considered to be alike or different from individuals. Thus, corporations are persons for purposes of the Fourth Amendment’s protections against searches and seizures and the Fifth Amendment’s prohibition on double jeopardy, but not a person for purposes of the Fifth Amendment’s protection against self-incrimination.⁵⁷ Similarly, corporations are protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment but not by the Fourteenth Amendment’s Privileges and Immunities Clause.⁵⁸

While these explanations may offer some insight into why analogy is often used in the private-entity context, none of them necessarily suggests that analogy should be used. The next Part explores whether the use of analogy may actually be counter-productive in determining private-entity liability, by examining three Supreme Court opinions in § 1983 and *Bivens* cases in which analogy played a significant role in the Court’s decision.

IV. THE FAILURE OF ANALOGY—THREE EXAMPLES

Three examples from recent Supreme Court decisions help show some of the problems with the use of analogy that arise in the § 1983 and *Bivens* contexts. Not all of the examples are § 1983 cases. In fact, two examples arise from *Bivens* actions,⁵⁹ but I think they are nonetheless appropriate because of the similarities between *Bivens* and § 1983 actions and because I think the decisions are revealing about the Court’s decision-making process in constitutional civil rights actions. Additionally, although one example involves a government defendant,⁶⁰ I think the example is instructive because it reveals the danger of analogizing a case dealing with one class of defendants to another class of defendants.

⁵⁵ STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 2 (2d ed. 2009) (quoting the MODEL BUS. CORP. ACT § 3.02 (2006)).

⁵⁶ *Id.* (“In the eyes of the law, the corporation is an entity wholly separate from the people who own it and work for it.”).

⁵⁷ *See, e.g.*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (search and seizure); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (double jeopardy); *Hale v. Henkel*, 201 U.S. 43 (1906) (self-incrimination).

⁵⁸ *See, e.g.*, *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978) (due process); *Ashbury Hosp. v. Cass County*, 326 U.S. 207 (1945) (Privileges and Immunities Clause); *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886) (equal protection).

⁵⁹ *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

⁶⁰ *See Ashcroft*, 129 S. Ct. at 1937.

A. *Richardson v. McKnight*, 521 U.S. 399 (1997)—How a Flawed Analogy May Cause a Good Result to Be Limited or Opened Up to Attack

In *Richardson v. McKnight*,⁶¹ the Supreme Court addressed the applicability of qualified immunity to employees of private companies performing state functions. The Court ultimately concluded that the defendants were not entitled to qualified immunity,⁶² a result with which I agree, but it reached that result in part on reliance on what I believe to be a flawed analogy that could limit the reach of the decision and leave it vulnerable to attack.

The defendants in *Richardson* were correctional officers working at a private prison that had contracted with the State of Tennessee to incarcerate some of the State's inmates.⁶³ The plaintiff, Ronnie Lee Richardson, sued the officers under § 1983, alleging that the officers placed him in unreasonably tight restraints in violation of his constitutional rights.⁶⁴ In defending the action, the officers raised the defense of qualified immunity.⁶⁵ Under the defense of qualified immunity, individual government defendants are immune from damages under § 1983—even if they violate constitutional rights—unless their unconstitutional conduct violates “clearly established law” of which “a reasonable person would have known.”⁶⁶

The Supreme Court held that although government employees are entitled to qualified immunity under § 1983, the private prison guards in *Richardson* were not.⁶⁷ The Court's decision rested in significant part on analogy. The Court concluded that employees of a private company are different from government employees in “critical” ways and that as a result they are not entitled to immunity.⁶⁸

In drawing this distinction, the Court first identified the main purpose of qualified immunity, which in its view, is “to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.”⁶⁹ Without the protection of qualified immunity, the fear of being sued would cause employees to be overly timid in their behavior and insufficiently vigorous in the performance of important public duties.⁷⁰

⁶¹ 521 U.S. 399 (1997).

⁶² *Id.* at 402.

⁶³ *Id.* at 401-02.

⁶⁴ *Id.* at 402.

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

⁶⁷ *Richardson v. McKnight*, 521 U.S. 399, 401 (1997).

⁶⁸ *Id.* at 409 (noting the existence of “certain important differences” between government and private employees “that, from an immunity perspective, are critical”).

⁶⁹ *Id.* at 408 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

⁷⁰ *Id.* (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

The Court then concluded that these purposes did not apply to private employees in the same way as they did to government employees because, unlike government employees and agencies, private employees and firms are subject to “competitive market pressures” that mitigate the risk of “unwarranted timidity.”⁷¹ Specifically, the Court noted that private companies can buy liability insurance and can indemnify their employees,⁷² both of which substantially reduce an individual’s liability exposure for a particular act. The Court also noted that because private firms are subject to marketplace pressures and government monitoring, firms that employ either overly aggressive employees who violate constitutional rights or overly timid employees who fail to carry out their duties because of the fear of being sued can be easily replaced with another competitor that employs better personnel.⁷³ Thus, the Court concluded that because private employees operate under different conditions than public employees, they should not receive the protection of qualified immunity that public employees receive.

So far, this reasoning does not seem problematic. The availability of insurance and employee indemnification probably does reduce the risk of employee timidity and therefore may well justify exposing private employees to the full measure of damages liability without the protection of qualified immunity. But by resting its decision within the framework of analogy—specifically that these factors make private companies different from governments, and therefore, *because private companies are different*, they are not entitled to qualified immunity—the Court’s decision becomes vulnerable to attack and limitation.

A main problem of the Court’s decision, as the *Richardson* dissenters point out, is that the distinction that the Court draws is flawed. While the Court focuses on the availability of insurance and employee indemnification, it overlooks the fact that many government institutions purchase liability insurance and provide for employee indemnification. Research shows that plenty of government entities, particularly municipalities and local government bodies, purchase liability insurance.⁷⁴ Conversely, not all private companies buy liability insurance. Even some companies that face many § 1983 actions, such as private

⁷¹ *Id.* at 409 (“[T]he most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison.”).

⁷² *Id.* at 411 (noting that insurance coverage and employee indemnification “reduce[] the employment-discouraging fear of unwarranted liability potential applicants face”).

⁷³ *Id.* at 409 (“Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.”).

⁷⁴ See, e.g., Susan A. McManus & Patricia A. Turner, *Litigation as a Budgetary Constraint: Problem Areas and Costs*, 53 PUB. ADMIN. REV. 462, 468 (1993) (noting that 73.8% of respondents in a survey of municipalities indicated that they possessed litigation insurance, or that they were not self-insured, and that a majority of those surveyed believed that their litigation costs affected or would affect their insurance premiums).

prison companies, choose to self-insure rather than to purchase insurance.⁷⁵ Similarly, while private companies may often choose to indemnify their employees when those employees are sued, it appears that employee indemnification is also widespread among public bodies, both at the state and local level as well as at the federal level.⁷⁶ Moreover, as the *Richardson* dissenters argue, what is important from an immunity perspective is not whether governments *actually* insure and indemnify, but whether they *can* insure and

⁷⁵ For example, Corrections Corporation of America (“CCA”), the nation’s largest private prison operator, is “subject to substantial self-insurance risk” for ongoing litigation. See Corrections Corporation of America, *Corrections Corporation of America 2008 Annual Report 25*, available at <http://www.correctionscorp.com> (follow “Investors” link; then follow “2008 Annual Report” hyperlink); Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 315 (1990) (noting that many defendants are self-insured). Similarly, some government bodies may choose self-insurance over traditional insurance. See McManus & Turner, *supra* note 74, at 468 (indicating that a number of municipalities have chosen self-insurance, particularly as their liability costs have risen).

⁷⁶ See, e.g., Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 547 n.258 (1993) (noting that many state and local laws require indemnification of police officers); Lant B. Davis, et al., Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-11 (1979) (concluding from a sample of cases from Connecticut that police departments routinely footed the cost of lawsuits against individual officers); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000). It also appears that indemnification is common at the federal level. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens*, 88 GEO. L.J. 65, 76-78 & n.51 (1999) (noting that the federal government represented ninety-eight percent of *Bivens* defendants who requested counsel).

The *Richardson* Court’s conclusions about indemnification may not have been entirely their fault. The federal government suggested in its brief in *Richardson* that indemnification at the federal level is hardly guaranteed. Brief for the United States et al. as Amici Curiae Supporting Respondents, *Richardson v. McKnight*, No. 96-318, 1997 WL 63323, at *19 (U.S. Feb. 7, 1997) (noting that while private employers have “broad latitude” to indemnify employees, “[t]he government has only a limited ability to indemnify its employees for constitutional tort liability and is unable to promise in advance to indemnify employees for judgments of unknown magnitude”); see also Oral Argument of Jeffrey A. Lamken on Behalf of the United States, *Corr. Servs. Corp. v. Malesko*, No. 00-860, 2001 WL 1182728, at *24 (U.S. Oct. 1, 2001) (“The Government, for example, does not routinely indemnify its employees before a judgment or even necessarily after judgment. On occasion we both decline to indemnify them.”).

Additionally, it is conceivable that private employers may indemnify their employees less frequently, or to a lesser degree, than the government. See Oral Argument of Jeffrey A. Lamken on Behalf of the United States, *Corr. Servs. Corp. v. Malesko*, 2001 WL 1182728, at *24-25 (stating that a “corporation will not necessarily pick up the tab” for lawsuits against their employees and arguing that corporations should not indemnify automatically, but only where indemnification is “in the corporate interest”). To the extent that private employees are less likely to be unionized than government employees that may make it less likely that they have indemnification as one of their employee benefits.

indemnify.⁷⁷ Finally, the notion that private companies face replacement if their employees are either overly aggressive or overly timid assumes the existence of an efficiently functioning marketplace with many competitors. With respect to the market for many government functions, however, there appear to be few competitors and substantial barriers to changing providers in mid-stream.⁷⁸ Thus, to the extent that the Court based its decision on the differences between government and private entities, that distinction is a flawed one.

Still, an appropriate response might be to ask “so what?” If there is little justification for qualified immunity for private employees and if that is the result that the Court reached, then perhaps it does not matter whether the analogy the Court drew is weak. However, even if the Court reached the right result, by using the framework of analogy to focus primarily on whether private entities are alike or different from government entities instead of just focusing on whether the policies supporting qualified immunity apply to private entities, the Court’s decision rests on unsound footing that makes it vulnerable to attack in at least two ways.

First, the Court’s reasoning leaves open the opportunity for a private defendant to flip the decision on its head and argue that the more it behaves like a government entity, the greater entitlement it has to qualified immunity. Because of the Court’s focus on analogy, a private defendant in a § 1983 action could argue that it could show that government entities do purchase liability insurance and indemnify their employees and that as a result, the private defendants should receive qualified immunity because they are no different than the government employees who receive immunity. This reasoning, however, is backwards. In essence, a private defendant would be taking reasons not to provide qualified immunity—the fact that employers purchase insurance and provide for indemnification—and using them as a justification to *grant* qualified immunity, on the ground that those facts make private entities analogous to government entities. In fact, this is the approach taken by the *Richardson* dissent, which uses the availability of insurance and indemnification for government entities as a

⁷⁷ *Richardson v. McKnight*, 521 U.S. 399, 420 (1997) (“surely it is the *availability* of [insurance], rather than its actual presence in the case at hand, which decreases (if it does decrease, which I doubt) the *need* for immunity protection.”).

⁷⁸ In the welfare context, for example, “when the Arizona state legislature mandated the privatization of its state welfare system, only one company offered a bid; the state had no selection of alternatives. In Connecticut, Colonial Cooperative Care, Inc., was the only bidder for its contract to determine eligibility for disability-based cash assistance.” Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 87, 92 & nn.37-38 (1992). Similarly, by the late 1990s two companies accounted for more than 75 percent of the global private-prison market. Austin, *supra* note 7, at 3-4. Even if the government were inclined to switch competitors, it is not clear that doing so would be feasible. If one company is housing hundreds or thousands of a State’s prisoners, the costs of moving them to different facilities or bringing in different managers could be enormous.

reason to extend qualified immunity to private parties.⁷⁹ While this risk may seem more theoretical than real, the fact that *Richardson* did not hold categorically that private employees cannot receive qualified immunity opens the door for private defendants to make this argument.⁸⁰ Indeed, some lower courts have granted qualified immunity to some private defendants even after *Richardson*.⁸¹ In a framework where analogy is the decision-making fulcrum, this is a natural result, even if the application of the analogy operates at cross-purposes with the underlying goal that the analogy is supposed to serve.⁸²

A second, admittedly more speculative, possibility is that the Court recognized that its analogy was weak and as a result may have written “caveats” into its decision that threaten to mute the force of its rule.⁸³ At the end of its decision, the Court explicitly left open the possibility that private defendants may still be able to avail themselves of “good-faith” immunity in the absence of qualified immunity, but did not resolve the question.⁸⁴ Although the Supreme Court expressed no opinion on good faith immunity, lower courts both before and after *Richardson* have permitted private defendants to claim good-faith immunity, which protects an employee from damages unless the employee acted out of actual malice or ill-will.⁸⁵

Although tacked on at the end of the Court’s decision, this exception threatens to substantially undercut the force of the Court’s decision. Because actual malice is a relatively high standard, good faith immunity likely would apply in many of the same cases in which qualified immunity would apply. Moreover, given that it is a subjective standard and qualified immunity is an objective standard, it could apply to cases where qualified immunity would not

⁷⁹ See *Richardson*, 521 U.S. at 420 (Scalia, J., dissenting) (noting that governments can obtain insurance just as easily as private parties in arguing that private employees should receive qualified immunity under § 1983).

⁸⁰ *Id.* at 413 (stating that it was “answer[ing] the immunity question narrowly, in the context in which it arose”).

⁸¹ See, e.g., *Bartell v. Lohiser*, 12 F. Supp. 2d 640, 645-46 (E.D. Mich. 1998) (finding that employees of a private contractor providing foster care services could receive qualified immunity under § 1983).

⁸² Of course, one could also try and make the analogy work in the opposite direction and argue that because government entities are actually more like private entities than the *Richardson* Court acknowledged, government employees, like private employees should not receive qualified immunity. Even if that result is a good one, that analytical approach runs into the same problems. Determining whether government employees receive qualified immunity should turn on the nature of public employment and its application to the purposes underlying qualified immunity. It should not depend on whether government entities resemble private entities.

⁸³ See *Richardson*, 521 U.S. at 413 (closing its decision with “three caveats”).

⁸⁴ *Id.* at 413-14 (raising, but declining to express a view on, whether private defendants might be entitled to good-faith immunity).

⁸⁵ See, e.g., *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008) (allowing a private towing company to assert a good faith immunity defense in a § 1983 action); *Pinsky v. Duncan*, 79 F.3d 306, 311-13 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys, P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

apply. In some cases, an employee could violate clearly established law for which the employee would not be entitled to qualified immunity but without the subjective intent required to overcome the hurdle of good faith immunity. Thus, the possibility of the Court's own uncertainty about the strength of its decision in general and its analogy between private and government entities in particular may have caused the Court to water down its opinion in a way that may substantially blunt its force.

In short, *Richardson* identifies some good reasons why private entities should not get qualified immunity, or possibly even good faith immunity. But its misguided focus on analogizing or distinguishing government entities from private entities ultimately may hinder efforts to limit the reach of immunity doctrines under § 1983 and therefore may undermine the statute's ability to effectively protect and vindicate constitutional rights.⁸⁶

**B. *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001)—
Making Analogy Primary and the Underlying Policy Secondary**

A second example where the Supreme Court's focus on analogizing private defendants to government parties led to a flawed result is in *Correctional Services Corp. v. Malesko*.⁸⁷ Although *Malesko* was a *Bivens* action involving a private party contracting with the federal government rather than a § 1983 action involving a party contracting with a state or local government, the case may still be instructive because in both areas, a private party must perform state action to become subject to a claim and because the Court has applied § 1983 law to *Bivens* actions and vice versa.⁸⁸ In *Malesko*, the Court reached a result that it candidly acknowledged would hinder the protection of constitutional rights but held that it was compelled to do so on the basis of an analogy it drew between the private-entity defendant in *Malesko* and a federal agency.⁸⁹ In other words, the proper analogy became more important than the proper outcome. By using analogy as the framework for reaching with the result that the Court undermined the purpose of *Bivens* by using analogy as the framework for reaching its decision.

A *Bivens* action—named for the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁹⁰—allows a plaintiff to

⁸⁶ The *Richardson* court hinted at the idea that private entities are simply different than government entities, and therefore should be evaluated on their own terms, acknowledging that “government employees typically act within a *different* system,” than private employees and perhaps should simply be evaluated separately from each other. 521 U.S. at 410 (emphasis in original). But the Court does not develop the point in great detail, and it appears to be subsumed by the Court's more detailed analysis of why private entities are different from governmental entities.

⁸⁷ 534 U.S. 61 (2001).

⁸⁸ See, e.g., *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (noting that “a *Bivens* action is the federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.”).

⁸⁹ *Malesko*, 534 U.S. at 71.

⁹⁰ 403 U.S. 388 (1971).

sue a federal official for certain constitutional violations.⁹¹ The *Bivens* cause of action, unlike a § 1983 action, does not derive from a statute but instead is an implied right of action.⁹² Consequently, not every constitutional violation is actionable under *Bivens*, and courts apply several factors in deciding whether to imply a *Bivens* cause of action for a particular category of constitutional violations or for a particular category of defendants.⁹³ Moreover, although *Bivens* provides a cause of action against individual federal officers, a plaintiff cannot bring a claim against the federal government itself.⁹⁴ In *FDIC v. Meyer*, the Supreme Court held that the prohibition against suing the federal government also extended to suing specific federal agencies.⁹⁵

In *Malesko*, John Malesko, an inmate in a private halfway house run by the Correctional Services Corporation (“CSC”), sued CSC, which had contracted with the federal government to house certain federal prisoners, alleging that CSC violated his Eighth Amendment rights.⁹⁶ At issue in the case was whether a plaintiff can bring a *Bivens* action against a private company performing a public function as opposed to an action against the company’s employees.⁹⁷

Given the issue in the case, as well as the *Bivens* doctrine that provides for causes of action against individual officers but not against the federal government or its agencies, it is easy to see the critical role that analogy could play in determining the outcome of the case. Were the Court decided to analogize CSC to an individual officer, then the Court could conclude that a

⁹¹ See, e.g., *Bivens*, 403 U.S. at 389 (implying a cause of action against federal officials for violations of Fourth Amendment rights).

⁹² See *Malesko*, 534 U.S. at 66 (“In [*Bivens*], we recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” (citation omitted)).

⁹³ Compare, e.g., *Carlson v. Green*, 446 U.S. 14, 32 (1980) (allowing a *Bivens* action for Eighth Amendment Violations), and *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (allowing a *Bivens* action for Equal Protection violations under the Fifth Amendment), with *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (refusing to find a *Bivens* action for a First Amendment claim).

⁹⁴ See, e.g., *Randall v. United States*, 95 F.3d 339, 345 (4th Cir. 1996) (“*Bivens* did not abolish the doctrine of sovereign immunity of the United States. Any remedy under *Bivens* is against federal officials individually, not the federal government.”).

⁹⁵ *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

⁹⁶ *Malesko*, 534 U.S. at 64.

⁹⁷ *Id.* at 63 (“We decide here whether the implied damages action first recognized in [*Bivens*], should be extended to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons.” (citation omitted)). In *Malesko*, Mr. Malesko filed his original complaint pro se, naming CSC and several unnamed CSC employees as defendants. *Id.* at 64. After Mr. Malesko obtained counsel, counsel amended the complaint to add the names of the individual defendants. *Id.* However, because the amendment adding the individual defendants’ names did not relate back to the original complaint within the meaning of Fed. R. Civ. P. 15, the district court dismissed the claims against the individual defendants on statute of limitations grounds, and that portion of the district court’s decision was affirmed by the U.S. Court of Appeals for the Second Circuit. *Id.* at 65. Thus, the only question before the Supreme Court was the availability of an action against CSC.

cause of action was available. Conversely, were the Court chose to analogize CSC to a federal agency, then no cause of action would lie.⁹⁸

The Court held that no cause of action was available against a private corporation under *Bivens*, concluding essentially that private corporations were akin to federal agencies and therefore because no cause of action was available against a federal agency, no cause of action was available against CSC either.⁹⁹ The Court started out by describing the primary purpose of *Bivens* actions to be to deter constitutional violations by individual federal officers.¹⁰⁰ The Court then cited its decision in *Meyer* that suits against a federal agency would purportedly undermine deterrence of individual officers because plaintiffs would choose to sue federal agencies rather than individual officers.¹⁰¹ The Court then held that a claim against a private corporation “is, in every meaningful sense, the same” as a claim against a federal agency.¹⁰² It concluded by saying that as with a claim against a federal agency, suing corporate defendants would somehow undermine deterrence of constitutional violations by individual employees because the employees themselves would never face suit.¹⁰³ The Court made it sound as if its conclusion were compelled by *Meyer*, stating that “[o]n the logic of *Meyer*, inferring a constitutional tort remedy against a private entity . . . is therefore foreclosed.”¹⁰⁴

Significantly, the Court acknowledged that allowing private corporations to be sued under *Bivens* would likely deter constitutional misconduct but nonetheless refused to find a cause of action on the ground that it would undermine the analogy to *Meyer*. Mr. Malesko argued to the Court that because CSC was a private company, making CSC responsible for its constitutional violations would be “the best way to discourage future harms.”¹⁰⁵ The Court candidly conceded “[t]hat may be so,” but quickly dismissed that argument on the ground that the reasoning was inconsistent with *Meyer*’s conclusion that federal agencies were not amenable to suit.¹⁰⁶

⁹⁸ Alternatively, the Court could have decided not to draw an analogy at all, and simply evaluate private corporations in light of the policies and purposes of *Bivens*. In other words, the Court could have decided that private corporations are different from both individual officers and from agencies such that neither category should provide the dispositive rule for the case. That approach may have been the most sensible approach, but it was not one followed by either the majority or the dissent.

⁹⁹ See *Malesko*, 534 U.S. at 70-71.

¹⁰⁰ See *id.* at 70 (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”).

¹⁰¹ *Id.* at 70-71 (“If we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. The deterrent effects of the *Bivens* remedy would be lost.” (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994))).

¹⁰² *Id.* at 71.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

The Court's decision is rather remarkable and demonstrates the primacy of analogy over purpose. The Court refused to provide a cause of action against private entities, even while acknowledging that doing so would lead to more constitutional violations, because the Court felt that result was necessary in order to maintain its analogy between private entities and federal agencies. In other words, having decided that a private entity was analogous to the federal agency in *Meyer*, the analogy dictated the outcome of the case regardless of how whether its decision furthered the purposes of *Bivens*. Instead of focusing on the policies underlying *Bivens*, applying those policies to private entities, and then using the result of that analysis to determine whether private entities should be considered similar to or different from federal agencies, the Court did the reverse, deciding which analogy to draw and then used the analogy to control its decision.

To be fair, the *Malesko* Court did attempt to tie its analogy to the policies of *Bivens* by asserting that the purpose of *Bivens* is to deter individual actors rather than institutional actors.¹⁰⁷ But, particularly in the private context, the notion that suing a private entity would deter violations by the entity but would fail to deter violations—or possibly lead to increased violations—by the entity's employees makes little sense. A private entity can act only through its employees or agents.¹⁰⁸ Therefore, it would be seemingly impossible to reduce violations by a private-entity without at the same time reducing the violations of its employees and agents. In the private context, to reduce the violations of the entity is to reduce the violation of its employees.¹⁰⁹

The Court's attempt to create a line of demarcation between individual government defendants and government entity defendants and then to label private entities as either one or the other reveals one danger of analogizing private entities to government actors. While such a separation may be necessary in the government context because of sovereign immunity,¹¹⁰ it may be much more difficult—and much less advisable—to try and disentangle a private entity from its employees. On the one hand, it can act only through its employees, and

¹⁰⁷ *Id.* Even that part of the analogy is subject to criticism. In *Meyer*, the Court concluded that the reason why allowing a cause of action against a federal agency would cause plaintiffs to sue the agency only and not the officers is that the officers could claim qualified immunity. See *Meyer*, 510 U.S. at 485 (“If we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers.”). That rationale does not apply as strongly to a cause of action against private entities, because under *Richardson*, private employees generally do not receive qualified immunity, though, as explained above, they may be able to claim good faith immunity. *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997).

¹⁰⁸ For example, the *Malesko* complaint alleged that several individual correctional officers violated Mr. Malesko's constitutional rights and that CSC, as their employer, was liable for their misconduct. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 64-65 (2001).

¹⁰⁹ See also *id.* at 80-81 (Stevens, J., dissenting) (“It cannot be seriously maintained, however, that tort remedies against corporate employers have less deterrent value than actions against their employees.”).

¹¹⁰ While sovereign immunity may be a reason to have separate rules for entities as opposed to individuals, the Court in *Meyer* refused to permit a cause of action against the Federal Deposit Insurance Corporation even though it had waived its sovereign immunity. *Meyer*, 510 U.S. at 483.

on the other hand, the corporate form exists in order to create some corporate identity that is distinct from its employees and officers. Thus, private entities cannot be easily categorized as being like employees or as being like government entities, and the Court's attempt to try and analogize private actors to government actors therefore can lead to misguided results.¹¹¹

Moreover, the basic tort and agency principle of respondeat superior—that an employer is liable for the torts of its employees committed within the scope of employment¹¹²—is based in part on the idea that placing liability on an employer will help reduce the misconduct committed by its employees, both because the employees may be judgment-proof and therefore insufficiently deterred by the threat of damages liability,¹¹³ and because placing liability on the employer can induce the employer to engage in better employee training and hiring practices, as well as engaging in other measures to encourage employees to safeguard constitutional rights.¹¹⁴

Further, the Court's view that placing liability on the entity will undermine deterrence of individual misconduct appears inconsistent with its prior decisions. The *Richardson* Court recognized that companies have incentives to reduce employee misconduct in order to minimize the risk that a government contractor will replace that company with a competitor whose employees better safeguard constitutional rights.¹¹⁵ Similarly, in *Owen v. City of Independence*,¹¹⁶ in which

¹¹¹ The *Malesko* dissenters appeared to recognize this difficulty of saying that entities are somehow categorically different from the employees who act on their behalf. The dissent focused on the law of agency and distinguished the federal government from federal agents. The dissent argued that while a plaintiff cannot bring a *Bivens* claim against the federal government a plaintiff should be able to bring a *Bivens* action against an agent of the federal government, whether that agent was in human form or corporate form. See *Malesko*, 534 U.S. at 75-83 (Stevens, J., dissenting) (arguing that “corporate agents performing federal functions, like human agents doing so,” should be suable under *Bivens*). The risk of such an approach, however, is that it lends itself to equating private entities with individual government employees. While such a result may work well in the context of who may be sued under *Bivens*, it may be problematic in other contexts by suggesting that both private entities and private employees should be treated just like government employees. In particular, such an argument could be used to assert, as the dissenters did in *Richardson*, that private actors sued under § 1983 should receive qualified immunity. *Richardson*, 521 U.S. at 414-23.

¹¹² See DAN B. DOBBS, *THE LAW OF TORTS* 905 (2000).

¹¹³ See, e.g., Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1241-52 (1984) (describing how respondeat superior might help prevent employers from making side payments to judgment proof employees rather than take measures to reduce liability risk).

¹¹⁴ See, e.g., DOBBS, *supra* note 112, § 334 at 908 (explaining that respondeat superior liability may encourage employers to take measures to reduce the risk that their employees will violate the law); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 173 (1987); Sykes, *supra* note 113, at 1251 (“Alternatively, vicarious liability may lead to the employment of more financially responsible agents with an attendant increase in loss-avoidance effort.”).

¹¹⁵ See *Richardson*, 521 U.S. at 409 (noting that “[c]ompetitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement”).

¹¹⁶ 445 U.S. 622 (1980).

the Court held that municipalities (as opposed to municipal employees) are not entitled to qualified immunity for good faith conduct, the Court explicitly held that placing liability on the municipality would deter violations by employees.¹¹⁷ The Court stated that “[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.”¹¹⁸

Thus, by elevating the framework of analogy above the purposes of *Bivens*, the Court reached a result that will undermine deterrence of constitutional violations and that is arguably inconsistent with its own prior precedent.

C. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)—Extending Analogy Beyond Its Moorings

A final case that highlights the dangers of using analogy as an interpretive tool in the § 1983 and *Bivens* contexts is the Supreme Court’s decision last term in *Ashcroft v. Iqbal*.¹¹⁹ *Iqbal* is also a *Bivens* case, and unlike the first two examples, it involves government defendants rather than private defendants. Nonetheless, *Iqbal* may be a useful example because it uses analogy to apply a liability rule involving entity defendants—in this case municipalities—to individual defendants, and in doing so reaches a result that extends far beyond what the analogy itself would support.

Although *Iqbal* has received significant attention for its potential effect on notice pleading, it also may have significant implications for the doctrine of supervisory employee liability under § 1983 and *Bivens*. The plaintiff, Javid Iqbal, alleged that he was arrested by the federal government after the September 11th attacks and labeled a “high interest” detainee.¹²⁰ He alleged that federal officers exposed him to unconstitutionally severe conditions of confinement on account of his race, religion or national origin in violation of the First Amendment and the Fifth Amendment.¹²¹ Mr. Iqbal sued not only the officers who were directly responsible for his mistreatment, but he also sued then-Attorney General John Ashcroft and then-Director of the Federal Bureau of Investigation (“FBI”) Robert Mueller under a theory of supervisory liability.

¹¹⁷ *Id.* at 651-52; *see also id.* at 652 (“Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.” (footnote omitted)). The Court even suggested that entity liability could deter more effectively than individual liability by reaching instances of “‘systemic’ injuries that result not so much from the conduct of any single individual but from the interactive behavior of several government officials.”)

¹¹⁸ *Id.* at 652.

¹¹⁹ 129 S. Ct. 1937 (2009).

¹²⁰ *Id.* at 1943.

¹²¹ *Id.* at 1943-44. Iqbal alleged, among other things, that the defendants beat him, subjected him to serial strip searches and body cavity searches without proper justification, refused to let him pray, and kept him and other detainees in lockdown for twenty-three hours a day. *Id.*

Specifically, Mr. Iqbal alleged that Ashcroft and Mueller had constructive knowledge of the officers' behavior and failed to stop it.¹²² Prior to *Iqbal*, lower courts had recognized that supervisory employees could be liable for damages under § 1983 and *Bivens* where the supervisor was grossly negligent or deliberately indifferent to the risk of constitutional violations.¹²³

The Court rejected Mr. Iqbal's supervisory liability claim and cast doubt on whether supervisory liability is a valid doctrine at all under either § 1983 or *Bivens*.¹²⁴ The Court went a step further than the parties, holding that not only was a high-level official's constructive knowledge insufficient to support supervisory liability, but also that the official's actual knowledge would not support supervisory liability.¹²⁵ The Court once again used the framework of analogy as a central ground for its decision. The Court began by noting that *Bivens* is the federal analog to § 1983 and that under § 1983, under the Court's decision in *Monell v. Department of Social Services of the City of New York*,¹²⁶ municipal defendants under § 1983 could not be held liable under a respondeat superior theory.¹²⁷ Although the Court also cited some very old pre-*Bivens* decisions regarding the liability of federal officers, those decisions did not arise in a *Bivens* context and were ambiguous with respect to supervisory liability, and therefore did not appear to provide the primary support for the Court's conclusion.¹²⁸

The Court then took *Monell's* rule of no respondeat superior liability for municipalities and extended it to limit the supervisory liability of individual officers, essentially equating the concept of vicarious liability with supervisory liability. The Court stated that in the § 1983 and *Bivens* contexts, "the term 'supervisory liability' is a misnomer and that supervisory liability "is

¹²² *Id.* at 1944.

¹²³ *See, e.g.,* *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) (describing supervisory liability standards); *see also Iqbal*, 129 S. Ct. at 1958 (Souter, J., dissenting) (describing various lower court tests for supervisory liability and distinguishing them from vicarious liability).

¹²⁴ *Iqbal*, 129 S. Ct. at 1948-49.

¹²⁵ *Id.* at 1949 (rejecting the argument that a supervisor's "mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution").

¹²⁶ 436 U.S. 658 (1978).

¹²⁷ *Iqbal*, 129 S. Ct. at 1948 (citing *Monell*, 436 U.S. at 691, for the proposition that there is "no vicarious liability for a municipal 'person' under 42 U.S.C. § 1983").

¹²⁸ Specifically, the Court cited *Dunlop v. Munroe*, 11 U.S. 242, 269 (1812), a decision that is nearly 200 years old, for the proposition that a federal officer's liability "will only result from his own neglect" in failing to supervise the officer's subordinates. But if an officer's negligence in supervising employees is sufficient to support liability, then surely an officer's gross negligence or deliberate indifference—the standard typically required for supervisory liability—would also support liability. Similarly, the Court cited *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888) for the proposition that an officer generally is not liable for the acts of his or her subordinates. This also is not inconsistent with supervisory liability, which establishes that while a supervisory ordinarily is not automatically liable for the actions of his or her subordinates, the supervisor may be liable when possessed with actual or constructive knowledge of the subordinates' unconstitutional conduct.

inconsistent” with the principle that high-level officials “may not be held accountable for the misdeeds of their agents.”¹²⁹

The result of *Iqbal* is that the scope of supervisory liability is unclear. One reading is that supervisory liability still exists, but that the supervisory official must have the same state of mind as the offending subordinate. In *Iqbal*, because the specific violations alleged, discrimination in violation of the First and Fifth Amendments, requires discriminatory intent, the mere allegation of a supervisor’s knowledge was insufficient to support supervisory liability in the absence of allegations that the supervisors also acted with discriminatory purpose.¹³⁰ Another reading is that the Court rejected the theory of supervisory liability altogether. In fact, that is the reading taken by the *Iqbal* dissent.¹³¹

Under either reading, however, the Court’s decision to analogize the municipal defendant in *Monell* to the individual high-level officials in *Iqbal* and to use *Monell*’s holding about vicarious liability as a basis for significantly curtailing—or perhaps eliminating—supervisory liability extends *Monell*’s holding far beyond its moorings. As the dissent pointed out, there is a significant difference between the traditional form of respondeat superior liability rejected in *Monell* and the supervisory liability rejected in *Iqbal*.¹³² Respondeat superior liability is a form of strict liability in which an employer is held liable for its employee’s torts regardless of fault, and even if the employer took preventive measures to reduce the risk of misconduct.¹³³ Supervisory liability applies only when the supervisory employee is culpable in some way, through either gross negligence, deliberate indifference, or where the supervisor ratified the unlawful behavior.¹³⁴

Moreover, *Monell* never held that municipalities could never be held liable for its employees’ unconstitutional conduct. Rather, the Court held that a municipality could be held liable where a municipal policy or custom caused the violation.¹³⁵ The standard for whether municipal officials established an unconstitutional policy or custom is an objective one, and unlike in *Iqbal*, it does not depend on the state of mind required for the underlying constitutional violation.¹³⁶

¹²⁹ *Iqbal*, 129 S. Ct. at 1949.

¹³⁰ *See id.* (“[P]urpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.”).

¹³¹ *Id.* at 1957 (Souter, J., dissenting) (“Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.”).

¹³² *Id.* at 1958.

¹³³ *See, e.g.,* Konradi v. United States, 919 F.2d 1207, 1210 (7th Cir. 1990) (identifying respondeat superior liability as a form of strict liability that applies regardless of the employer’s fault or lack of fault).

¹³⁴ *See supra* note 123

¹³⁵ *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

¹³⁶ In *City of Canton v. Harris*, 489 U.S. 378, 388-89 & n.8 (1989), the Supreme Court held that a municipality could be liable under § 1983 for failing to adequately train its employees if the

Additionally, the Court's reliance on *Monell* underscores the dangers of analogizing entities with individuals. *Monell*'s reasoning rested on concerns relating specifically to municipalities and its reasoning has little applicability to individual defendants. The *Monell* Court relied heavily on the legislative history of § 1983 (which itself may be reason to question *Monell*'s applicability to *Bivens* actions), and specifically on both constitutional concerns relating to imposing vicarious damages liability on municipalities as well as on the rejection of an Amendment that dealt specifically with expanding municipal liability and which did not address individual liability.¹³⁷ Indeed, the Court acknowledged strong policy reasons for imposing respondeat superior liability, but found that those policy rationales could not overcome the legislative history relating specifically to municipal liability.¹³⁸ The Court's decision therefore related only to the scope of damages liability for municipal actors and did not address the contours of liability for individual defendants, supervisory or otherwise. Notwithstanding *Monell*'s limitations on municipal liability, lower courts developed a separate and distinct doctrine of supervisory liability under § 1983 that permitted liability where a supervisor knew of the risk of unconstitutional conduct and failed to try to prevent it.¹³⁹ Thus, while the *Iqbal* Court used *Monell* to suggest that the decision was inconsistent with theories of supervisory liability, in fact *Monell*'s rules on municipal liability co-existed peacefully with theories of supervisory liability. Because the rules regarding liability of municipal entities differ from those for supervisory employees, the Court's analogy to *Monell* provides a weak basis for evaluating supervisory liability.

Again, the Court's reasoning elevates analogy over substance. The Court took *Monell* as a starting point and concluded that based on *Monell*, the scope of supervisory liability necessarily had to be limited, regardless of the underlying purposes of § 1983 and *Bivens* and regardless of the wisdom of the analogy to *Monell* in the first place. The Court's reliance on a flawed analogy limited the scope of § 1983 and *Bivens*, and reduced the ability of victims of constitutional misconduct to vindicate their rights.

municipality's failure to train evidences deliberate indifference to the risk of a constitutional violation. The Court specifically stated that "[t]he deliberate indifference standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Id.* at 388 n.8. Similarly, in *Baker v. District of Columbia*, 326 F.3d 1302 (D.C. Cir. 2003), which involved an Eighth Amendment claim by a prisoner for a denial of medical care, the Court held that while the prisoner had to show subjective deliberate indifference to make out the underlying constitutional violation, the standard for a municipal custom or policy was an objective one that could be satisfied by showing that municipal officers knew or should have known about the risk of unconstitutional behavior and failed to take action to prevent it. *Id.* at 1306-07.

¹³⁷ *Monell*, 436 U.S. at 691-94.

¹³⁸ *Id.* at 693-94 (noting that respondeat superior may help spread the costs of accidents across the community and may reduce total accident costs but holding that these justifications were "insufficient" to overcome Congress's constitutional objections to imposing vicarious liability on municipalities).

¹³⁹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1958 (2009); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).

All three decisions suggest that the Court's use of analogy to determine the liability of private entities in the § 1983 and *Bivens* contexts can backfire and that the form of analogy can take center stage at the expense of the underlying purposes of § 1983 and *Bivens*. This is not to say that analogy can never be useful. Analogy often is a valuable analytical tool, and there may be cases, including cases arising in the *Bivens* and § 1983 contexts in which using the framework of analogy can lead to sound and defensible outcomes.¹⁴⁰ Rather, my point is that in the context of private-entity liability, analogy is often misused in ways that serve to overly constrain the reach of § 1983 and *Bivens* and that exert substantial costs on individuals who are at risk of suffering constitutional deprivations. For that reason, analogy may not be an effective analytical framework with respect to questions relating to private entity liability for constitutional violations.

V. AN ALTERNATIVE TO ANALOGY

Asserting that courts should shy away from applying an analogy framework tells them how not to determine private-entity liability, but it does not give much guidance about what should replace analogy as a framework for assessing private-entity liability. The question of what is the right framework is harder to answer than asserting what is the wrong framework, and this article offers one possible alternative. As an initial matter, in considering how to go about addressing private-entity liability questions, courts should start by recognizing that private-entities are a distinct category that is different from the category of government defendants. They may have some similarities to government employees, but also some differences, and the same is true with respect to supervisory employees or government entities. The first step in assessing private-entity liability is acknowledging that private entities should be evaluated on their own terms and not on the basis of how alike or different they are from various government actors.

Viewing private entities as their own category suggests that one possible way to address private-entity liability is to utilize and apply the already well-developed and fulsome body of law that exists to determine the liability of private parties for their injurious acts—private tort law—to the extent that it is consistent with § 1983's broad remedial purposes.¹⁴¹ Private tort law has already

¹⁴⁰ For example, the Court has recognized that grand jurors, notwithstanding their status as private individuals, are entitled the same level of immunity as other individuals—such as judges and prosecutors—that exercise discretionary functions in carrying out the judicial function. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976).

¹⁴¹ The major purposes of § 1983 are to compensate victims of constitutional injury as well as to deter future violations. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Many of the members of Congress debating § 1983 explicitly stated that the statute was intended to be read broadly in light of its remedial purpose. *See, e.g., CONG. GLOBE*, 42d Cong., 1st Sess. App. 68 (1871) (statement of Rep. Shellabarger) (stating § 1983 should be “liberally and beneficently

established rules for when private parties can claim immunity from damages, when private-entities are vicariously liable for the torts of their employees, when an employee's negligent supervision of subordinates gives rise to liability, and when private-entities can be liable for punitive damages among other things. Applying these rules to private-entities would avoid the difficulties and inconsistencies created by the various special protections that Courts have erected for § 1983 and *Bivens* defendants such as qualified immunity, protection from respondeat superior liability, a particularly onerous standard of supervisory liability, and limitations on implied rights of action in the *Bivens* context. Given both that this body of private tort law already is well-developed and that it is routinely applied to private parties in tort contexts outside of § 1983 and *Bivens*, there is no reason not to apply it to private § 1983 defendants as well. Moreover, doing so would be consistent with the Court's view that the framers of § 1983 were familiar with the common law of torts and that "they likely intended these common law principles to obtain, absent specific provisions to the contrary."¹⁴² Because tort law provides the governing common-law rules for private-party liability, there may be good reason to apply tort law principles to private § 1983 defendants as well.

Additionally, that private entities or employees should receive special protections from liability—such as qualified immunity or an exemption from respondeat superior liability or supervisory liability—simply because a plaintiff sues the private party under § 1983 rather than under state tort law would appear to make little sense. It is not at all clear that a private party's incentives or behavior is any different when performing state action than when engaging in private behavior. For example, it is unlikely that a private debt collector would be more timid or fearful of lawsuits so as to justify the need for qualified immunity because it happens to be collecting a government debt rather than a private debt, or that imposing respondeat superior liability on the debt collector would lead to less deterrence when collecting government debts than when collecting private debts.¹⁴³

Similarly, some misconduct by private parties acting under color of state law will give rise to both § 1983 claims and state tort claims.¹⁴⁴ For example, a §

construed" because it is "remedial and in aid of the preservation of human liberty and human rights"); *id.* at 217 (statement of Sen. Thurman) (stating that § 1983's language is without limit and "as broad as can be used").

¹⁴² *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

¹⁴³ Debt collectors may be considered state actors for purposes of § 1983 when operating on the government's behalf. In *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008), a plaintiff sued a private company running a "bad check diversion program" for the State of California under § 1983 as well as under other federal and state laws. The debt collector claimed that it was entitled to state sovereign immunity because it was working on behalf of the State. *Id.* at 1072. The court rejected the sovereign immunity argument, but it did indicate that the defendant could be considered a state actor for purposes of § 1983. *See id.* at 1081 n.16.

¹⁴⁴ While many § 1983 claims may have a state court analog, not all do. Certain constitutional rights, such as free speech and free exercise rights, privacy and reproductive rights, procedural due process rights including the notice and opportunity to be heard, substantive due process rights, voting rights protections, Fourteenth Amendment equal protection guarantees, and Fourth Amendment protections against warrantless searches may not receive equivalent protections under

1983 claim under the Eighth Amendment against a prison health care provider for failing to provide constitutionally adequate medical treatment also would support a state medical malpractice claim.¹⁴⁵ Given that the same conduct is at issue in both the state and federal claim, there is no reason that the private defendant would need particular protections from liability that do not exist under traditional tort law. If imposing respondeat superior liability would promote compensation objectives and help induce the private defendant to take actions to reduce the risk of future torts, then the same would likely be true in the § 1983 context. Merely changing the legal label of the claim does not change the incentives facing the private actor. Yet currently, courts give private actors extra liability protections under § 1983 that they do not receive under ordinary tort law by focusing on comparing private entities to government actors rather than looking at whether liability would further the goals that the tort system is supposed to serve.

The idea of using tort law and tort law rhetoric to determine the scope of § 1983 in general is not a new one, and it is one that has received scholarly criticism. Professor Sheldon Nahmod has argued that the Supreme Court has shifted away from using constitutional rhetoric in § 1983 actions in favor of using tort rhetoric and that the effect of using tort rhetoric has been “to marginalize § 1983 and to make it less protective of fourteenth amendment rights.”¹⁴⁶ Professor Nahmod identifies several examples of how tort rhetoric has restricted the reach of § 1983. Specifically, he notes that tort rhetoric has been used to hold that § 1983 plaintiffs are not entitled to presumed damages for violations of constitutional rights but can only receive actual compensatory damages.¹⁴⁷ He also demonstrates how tort rhetoric have been used to limit procedural due process protections by noting that the Court created an elevated standard for showing a violation of a protected liberty interest in order to prevent ordinary torts from becoming constitutional violations.¹⁴⁸

I agree with many of Professor Nahmod’s warnings about how tort rhetoric can undermine rather than protect § 1983. In the private-entity context, however, it appears that it is the constitutional rhetoric, or state-action rhetoric that limits the reach of § 1983 and *Bivens*. Private tort defendants generally cannot claim

state tort law. For a more detailed discussion on why state tort remedies are an inadequate substitute for § 1983 remedies, see Frankel, *supra* note 17, at 1510-13.

¹⁴⁵ In *Estelle v. Gamble*, the Supreme Court held that prisoners have a constitutional right to a certain level of medical care and that a state actor violates a prisoner’s Eighth Amendment right against cruel and unusual punishment when the state actor behaves with “deliberate indifference to [the] serious medical needs” of the prisoner. 429 U.S. 97, 104 (1976).

¹⁴⁶ Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO L.J. 1719, 1720 (1989).

¹⁴⁷ *Accord Memphis Comm. Sch. v. Stachura*, 477 U.S. 299, 303 (1986) (holding that a plaintiff cannot recover under § 1983 for the abstract violation of a constitutional right but only to compensate for actual injuries suffered); see Nahmod, *supra* note 145, at 1727 (citing *Carey v. Piphus*, 435 U.S. 247 (1978)); see also Beermann, *supra* note 52, at 70-71 (describing how the Court applied common-law tort principles to limit the ability of plaintiffs to recover non-compensatory damages).

¹⁴⁸ See Nahmod, *supra* note 146, at 1728-31.

qualified immunity, or allege that they cannot be held liable under respondeat superior principles, or that there is no implied right of action against a private-entity at all. Rather, those protections have arisen specifically in the context of constitutional torts and private entities have attempted to avail themselves of those protections on the ground that they are defenses specific to *constitutional* tort claims. Using this constitutional rhetoric also leads to the incongruous result that private-entities have less damages exposure for constitutional torts—which arguably are among some of the most egregious forms of torts—than they do for ordinary torts.¹⁴⁹ Consequently, in the context of private-entity § 1983 liability, applying tort principles may actually further, rather than retrench, § 1983’s purposes.

Using tort principles as a guide certainly is no panacea. Just as courts can use analogies as a veneer for naked policy decisions, they can do the same with tort principles.¹⁵⁰ Additionally, many states may adopt tort rules that do not advance § 1983’s purposes of deterrence and compensation. For instance, many states have notice provisions that bar plaintiffs from bringing lawsuits against government actors unless they first give notice within a specified time of the injury.¹⁵¹ Or, state tort reform efforts may lead to damages caps or other limitations on liability or recovery.¹⁵² Perhaps tort principles could be applied to private entities to the extent consistent with § 1983’s purposes of deterrence and compensation. Just as § 1983 preempts state notice provisions,¹⁵³ special state tort rules that deviate from general common law principles and that are seen as inconsistent with § 1983 should not necessarily govern private-entity § 1983 liability. Alternatively, it may be that applying tort law will lead to some limitations on private-entity liability as well as some expansions. On the whole,

¹⁴⁹ See *Taylor v. Plouisis*, 101 F. Supp. 2d 255, 263-64 n.4 (D.N.J. 2000) (“It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.”); see also *Smith v. Wade*, 461 U.S. 30, 48-49 (1983) (“As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.”).

¹⁵⁰ On the other hand, it is possible that given how well-developed private tort law is relative to the more-undeveloped area of private-entity § 1983 liability, it may be that there will be less wiggle room under private tort law to impose its policy preferences than there is under the framework of analogy.

¹⁵¹ See, e.g., D.C. CODE § 12-309 (2009) (requiring plaintiffs suing the District of Columbia to give notice to the Mayor within six months of the injury). Most of these statutes apply specifically to suits against the government and therefore likely would not apply to private-entities, even private-entities performing state action.

¹⁵² See, e.g., Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform”*, 39 AKRON L. REV. 909, 913 n.11 (2006) (identifying various state tort reform statutes). For a sample of the large number of enacted and proposed state-level tort reform statutes, see National Association of Mutual Insurance Companies, *Tort Reform: An Overview of State Legislative Efforts to Improve the Civil Justice System*, available at <http://www.namic.org/reports/tortreform>.

¹⁵³ See *Felder v. Casey*, 487 U.S. 131, 134 (1988) (holding that § 1983 preempted a Wisconsin statute requiring a plaintiff to give notice to the government within 120 days of injury as a precondition of suit).

however, I believe that while applying tort principles may not lead to perfectly optimal results, it will lead to better results than the analogy framework that many courts currently use.

Nor is tort law the only alternative to utilizing an analogy framework. Another option is to use a historical model. Professor Barbara Kritchevsky, for example, suggests that private-entity liability should focus on “private corporations’ historical liability” in conjunction with “the policies underlying § 1983.”¹⁵⁴ Although that option is a viable one, there are two risks with taking a historical approach. One is that determining the liability rules applicable to private parties in 1871 when § 1983 was enacted often can be difficult or impossible to determine. Majorities and dissents often have disagreed about what history shows,¹⁵⁵ and there may not always be a clear answer.¹⁵⁶ Moreover, in looking to history, the Court has been inconsistent about whether it wants to apply legal rules as they existed in 1871 or as they exist today.¹⁵⁷ Consequently, a historical approach may be open to the same opportunities for manipulation as are available when courts use analogies. On the whole, at least with respect to private-entity liability, tort law principles may provide a framework that both reduces the risk of manipulation and that can generally apply principles that appear consistent with the deterrence and compensation objectives of § 1983.

¹⁵⁴ Kritchevsky, *supra* note 4, at 39.

¹⁵⁵ In *Smith v. Wade*, 461 U.S. 30 (1983), for example, there was significant disagreement about whether historical evidence for requiring intentional misconduct supported an award of punitive damages under § 1983. Compare 461 U.S. at 39-45, with *id.* at 78 n.12 (Rehnquist, J., dissenting). Similarly, in *Richardson v. McKnight*, the majority asserted that historically, private prison operators did not receive special immunities under tort law while the dissent cited opposing historical evidence. Compare 521 U.S. at 404-07 (arguing that historically there was no immunity), with *id.* at 417 & n.2 (suggesting that some historical evidence existed supporting a grant of immunity). See also *Oklahoma City v. Tuttle*, 471 U.S. 808, 818 n.5 (1985) (identifying the disagreement between the majority and the dissent over whether municipalities historically were subjected to respondeat superior liability). The evolution in the Court’s thinking about § 1983 municipal liability also reveals the malleability of history-based arguments. In its 1961 decision in *Monroe v. Pape*, the Court interpreted the legislative history of § 1983 to conclude that municipalities were not “persons” within the meaning of § 1983. 365 U.S. 167, 187-92 (1961). Just seventeen years later, the Court reversed course, and on the basis of that same legislative history, overruled its decision in *Monroe* and concluded that municipalities are “persons” under § 1983. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 664-89 (1978).

¹⁵⁶ See, e.g., Beermann, *supra* note 52, at 75-76 (“The consensus in the commentary has been that the history of § 1983 is too indefinite to give real guidance on most questions, and that the Court should admit that it is making policy and not engaged in statutory construction.”). Professor Beermann cites Justice O’Connor’s dissenting opinion in *Smith v. Wade*, which concerned rules for punitive damages in § 1983 actions, where Justice O’Connor noted that both the majority and Justice Rehnquist in dissent had marshaled much historical evidence for each of their respective sides which caused her to conclude that that the evidence as a whole was unilluminating and that “[t]he battle of the string citations can have no winner.” 461 U.S. 30, 93 (O’Connor, J., dissenting).

¹⁵⁷ See Beermann, *supra* note 52, at 65 & nn.89-90.

VI. CONCLUSION

Because § 1983 most often is used to sue government defendants, courts are still grappling with how to develop liability rules and doctrines applicable to private parties that act under color of state law and therefore fall within the ambit of § 1983. One of the more common approaches that courts use to determine private-entity liability is that of analogy: if the court thinks that the private-entity sufficiently resembles a particular government actor, then the court tends to give the private-entity the same liability protections that the government actor receives. Conversely, if the entity is perceived as different from the government actor, then it does not receive the same liability protections. While analogy often can be a useful tool for extending legal rules to new situations, in the context of private-entity § 1983 liability, the use of analogy may backfire with the result that it limits the scope of § 1983 and undermines its goal of safeguarding constitutional rights. In relying on analogy, the courts often have made the analogy itself the focal point of its decision-making, often at the expense of the policies that the analogy is supposed to serve. Whether by using an analogy that is based on an incorrect factual comparison that leaves a decision open to attack, to letting the analogy dictate the outcome of the decision, to extending analogies beyond what their reasoning supports, the use or misuse of analogy supports the scholarly criticism that § 1983 doctrine is incoherent and simply a reflection of the Court's own policy goals. Instead of relying on analogy, courts should consider applying the body of law that already exists to govern injurious acts by private parties, which is private tort law. While tort law may not provide a perfect solution, it will avoid many of the specific liability barriers that have been established under § 1983 and *Bivens* and may better advance the goal of protecting constitutional rights.